Office - Supreme Court, U.S.
FILED
OCT 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

REPLY BRIEF OF PETITIONER.

JAMES D. WARD,
JOHN A. BOYD,
THOMPSON & COLEGATE,
3737 Main Street,
Suite 600,
Post Office Box 1299,
Riverside, Calif. 92502,
(714) 682-5550,
Counsel for Petitioner.

TABLE OF CONTENTS

Page

Argument 1

I.

The Constitutional Right of Access to the Voir Dire in Criminal Trials Cannot Be Denied in the Absence of a Compelling Governmental Interest 1

II.

There Is No Compelling Interest Warranting Closure in the Instant Case 3

A. The Hovey Opinion Is Not Sufficient Justification for Closing the Court and Sealing the Transcript 3

B. No Alleged Right of Juror Privacy Justifies Closing the Courtroom and Sealing the Transcript 4

Conclusion 7

TABLE OF AUTHORITIES

Cases

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 6

Globe Newspaper Co. v. Superior Court, 102 S.Ct. 2613 (1982) 1, 2, 3, 4

Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980) 3, 4, 7

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 6

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 1, 2

Ryder v. State, 100 Ga. 528, 28 S.E. 246 (1897) 5

Sprouce v. Commonwealth, 2 Va. Cas. 375 (1823) 5

Twining v. State, 198 A.2d 291 (1964) 5

United States v. Barnes, 604 F.2d 121 (2d Cir.), cert. denied, 446 U.S. 907 (1979) 5

United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) 2, 3

United States v. Layton, 519 F.Supp. 959 (N.D. Cal. 1981) 5

Whalen v. Roe, 429 U.S. 589 (1977) 6

Constitution

United States Constitution, First Amendment 1, 7

Textbooks

Comment, The Right of Privacy of Prospective Jurors During Voir Dire, 70 Calif. L. Rev. 708 (1982) 5

Comment, Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy, 93 Harv. L,. Rev. 782 (1980) 5

No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

REPLY BRIEF OF PETITIONER.

ARGUMENT.

I.

THE CONSTITUTIONAL RIGHT OF ACCESS TO THE VOIR DIRE IN CRIMINAL TRIALS CANNOT BE DENIED IN THE ABSENCE OF A COMPELLING GOVERNMENTAL INTEREST.

Respondent concedes that the *voir dire* of prospective jurors is an integral part of criminal trials to which the public and petitioner have a right of access guaranteed by the First Amendment. See *Brief of Respondent*, at 6. This constitutional right of access was violated by the trial court by closing the crucial six weeks of *voir dire* in a capital case and permanently sealing the transcript. See *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2618 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

There is no disagreement between the parties that the closure in the instant case must be examined under the guidelines established by this Court in *Richmond* and reaffirmed in *Globe*. See *Brief of Respondent*, at 7-10. Accordingly, it must be determined that closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court, supra*, at 2620. In applying this Court's test to the closure of the *voir dire* in a capital case, the Ninth Circuit held that before closure can be utilized the court must make findings, articulated in the record, that: (A) Absent closure, there is a substantial probability of irreparable harm to a compelling interest; (B) no less restrictive alternatives to closure are available; and (C) closure will effectively protect against the perceived harm. *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982).

The sole disagreement in the instant case is whether the trial court correctly applied the test established by this Court. Respondent fails to cite any substantial evidence in the record that the trial court applied, or even considered, this test before closing the courtroom. Respondent offers no more than random recollections by the attorneys, and asserts, without support, that the trial court adopted their statements in support of closure.

There is no compelling state interest justifying closure articulated on the record. Additionally, the trial court failed completely to consider whether less restrictive alternatives were available. Contrary to respondent's contention, closing six weeks of *voir dire* while allowing access to only three days is hardly a reasonable alternative. Consideration of reasonable alternatives requires consideration of options short of any closure, a duty respondent failed to perform. Finally, the trial court failed to determine whether closure would effectively protect against *any* perceived harm, a require-

ment *Brooklier* found implicit in *Globe*. Without these required findings in the record, the trial court's orders cannot stand.

II.

THERE IS NO COMPELLING INTEREST WARRANTING CLOSURE IN THE INSTANT CASE.

A. The *Hovey* Opinion Is Not Sufficient Justification for Closing the Court and Sealing the Transcript.

Respondent contends that closure in the instant case is justified by the California Supreme Court decision of *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). There are two aspects of *Hovey* to be emphasized in contradiction of this contention.

First, nothing in *Hovey* specifically mandates closing the courtroom to the public at any time or for any purpose. To the contrary, the California Supreme Court expressly stated that *Hovey* "will not in any way affect the open nature of a trial."[1] 28 Cal. 3d at 80-81, 616 P.2d at 1354, 168 Cal. Rptr. at 181. This is acknowledged by the California State Public Defender, appellate counsel in *Hovey:* "If, as petitioner contends, the denial of public access was based on the trial court's 'application' of *Hovey*, that 'application' is unsupported by anything in the *Hovey* opinion and is erroneous." *Brief of Amicus California State Public Defender*, at 10.

Second, if *Hovey* is interpreted to require closure of the courtroom to the public, it suffers from the same constitutional infirmity as the statute struck down by this Court

---

[1]Despite this explicit language, trial courts continue to interpret *Hovey* to require court closure. Since the filing of Petitioner's brief, *voir dire* has been closed and the transcripts sealed in two additional capital cases in Riverside County alone. See, *People v. King*, Riverside Superior Court Case No. CR 19971; *People v. Daniels*, Riverside Superior Court Case No. CR 19711.

in *Globe*. *Per se* rules of trial closure, be they mandated by the legislatures or by the courts, are equally unconstitutional.[2]

B. No Alleged Right of Juror Privacy Justifies Closing the Courtroom and Sealing the Transcript.

Respondent contends also that closure can be justified as necessary to protect prospective jurors' rights of privacy. This contention is not supported by the facts of this case, nor by existing law. Respondent's argument that juror privacy constitutes a compelling interest invoked by the trial court to support closure is belied by the absence of any showing that closure would effectively protect against the perceived harm. The issue of juror privacy is not before the court.

Closure was initially based on an erroneous interpretation of *Hovey* and an unsupported notion that closure was necessary to protect the defendant's right to a fair trial. At the conclusion of the critical six weeks of *voir dire*, the trial court attempted to justify sealing the transcript of the closed proceeding by creating and applying a previously unrecognized right of juror privacy. This *post hoc* rationalization does not rise to the level of a compelling governmental interest necessitating closure. Further, there was no determination by the trial court that less intrusive alternatives to closure were unavailable.

Assuming, *arguendo*, that *voir dire* included inquiries involving possible privacy rights of jurors, the trial court

---

[2]Nor is the impact of *Hovey* on the constitutional right of access any longer limited to California. The Kentucky Supreme Court recently interpretated *Hovey* as requiring court closure, even though conceding such interpretation may well render it unconstitutional in light of *Globe*. *The Lexington Herald-Leader Company, Inc. v. Meigs*, and companion cases, 83-SC-218-TRG, 83-SC-214-TRG, 83-SC-215-TRG, August 31, 1983.

failed to consider less intrusive alternatives to closure. Since disclosure of personal matters should only be compelled when information obtained would shed light on the individual's ability to be impartial and fair, the court must consider any privacy interests of the venire persons before permitting such inquiries. If a potential juror has an expectation of privacy which arguably conflicts with a defendant's right to a fair trial, the court must attempt to balance the juror's and defendant's competing interests before the question is asked. It is *at that time* that the court must consider and, where appropriate, invoke any of the numerous alternatives that would adequately protect any expectation of privacy a prospective juror may have. These alternatives include using juror questionnaires to pinpoint any possible privacy problems; screening questions which will be asked during voir dire; rephrasing questions to minimize the intrusion upon the juror's personal affairs; providing prospective jurors with numbers, thereby withholding their identities until the jury is impaneled; and excusing jurors who decline to provide intimate information. Denying the public its constitutional right of access is not a valid alternative.[3] See, *e.g.*, *United States v. Layton*, 519 F. Supp. 959 (N.D. Cal. 1981); *United States v. Barnes*, 604 F.2d 121 (2d Cir.), *cert denied*, 446 U.S. 907 (1979); Comment, *The Right of Privacy of Prospective Jurors During Voir Dire*, 70 Calif. L. Rev. 708 (1982); Comment, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy*, 93 Harv. L. Rev. 782 (1980).

---

[3]The fact that closing the courtroom to protect privacy interests of the jurors is not a valid alternative can actually be supported by each of the cases cited by respondent, in that, in each such case, the court limited the *voir dire* questioning, not the public's access rights. See, *e.g.*, *Sprouce v. Commonwealth*, 2 Va. Cas. 375 (1823); *Ryder v. State*, 100 Ga. 528, 28 S.E. 246 (1897); *Twining v. State*, 198 A.2d 291 (1964).

In the last analysis, this so-called "juror right of privacy" invoked by respondent does not rise to the level of a compelling interest that can outweigh the constitutional right of access. To the contrary, this Court has recognized that any right of privacy can be limited or circumscribed by compelling governmental interests or by competing constitutional rights. See, *e.g.*, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977); *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975).

If the information sought from the potential juror does not reflect on his ability to be fair and impartial, then neither the defendant nor the public is entitled to the information. Any intrusion upon a prospective juror's expectation of privacy occurs, if at all, at the time the court compels him to answer, regardless of whether the courtroom is open or closed. Once the court determines that any privacy interest a juror might have is outweighed by the defendant's right to a fair trial, the information revealed becomes a matter of legitimate public interest and public access cannot be denied.

This Court has determined that "the commission of crime, prosecutions resulting from it, and judicial proceedings arising from prosecutions, however, are, without question, matters of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corporation v. Cohn*, *supra*, 420 U.S. at 492. Information bearing on the jury selection process and the qualifications of the trier of fact, especially in a capital case, is crucial to a complete understanding of the criminal justice system and, therefore, is a matter of legitimate public interest. No theory of juror privacy justifies the denial of such information to the public in the instant case.

CONCLUSION.

Denial of the constitutional right of access to criminal trials cannot stand in the absence of a compelling governmental interest and in the absence of a showing that less restrictive alternatives are unavailable. In the instant case respondent cites the California Supreme Court decision in *Hovey v. Superior Court* and suggests an unrecognized "right of juror privacy" in an effort to support the trial court's orders. Respondent inevitably fails, however, to bring forth any evidence to support its contention that the trial court on the record identified either of these interests as so compelling as to overcome the First Amendment rights involved. Respondent further fails to demonstrate through the record that the trial court considered and rejected less restrictive alternatives to closure. The trial court's failure to make specific findings, articulated in the record, compels a determination by this Court that the orders herein wrongly denied the constitutional right of access.

Respectfully submitted,

JAMES D. WARD,
JOHN A. BOYD,
THOMPSON AND COLEGATE,
Attorneys for Petitioner.